

(15) TRAINEE HANDOUT

TRAINING FOR VSO LESSON FIFTEEN UNDIAGNOSED ILLNESS CLAIMS

PREREQUISITE TRAINING

Prior to this training you must have completed all prior VSO training lessons.

PURPOSE OF LESSON

The purpose of this lesson is to introduce you to the regulatory requirements for claims based on undiagnosed illnesses as a result of Gulf War service. This lesson will present the following material to you:

- Required service dates in order to be considered under this law
- Specific duty locations in order to be considered under this law
- Specific disabilities and general symptoms covered by this law
- Qualifying provisions of this law

TIME REQUIRED

1.0 hours

INSTRUCTIONAL METHOD

Participatory discussion and practical exercise

MATERIALS/ TRAINING AIDS

Classroom or private area where a discussion may be held. Chairs and writing surfaces are required.

Large writing surface such as—easel pad, chalkboard, dry erase board, overhead projector, etc., with appropriate markers, or computer with projection equipment and PowerPoint software.

- *Undiagnosed Illness Claims* Unit PowerPoint presentation
- *Undiagnosed Illness Claims* Trainee Handouts

REFERENCES

- 38 CFR 3.317
- M21-1, Part III, 5.17
- M21-1, Part VI, 7.22
- Public Law 107-103

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Legislative History of 38 CFR 3.317

Soon after the first Gulf War (Operations Desert Shield and Desert Storm) concluded, VA began receiving a statistically significant number of claims from veterans of that conflict for disabilities that were not diagnosed based on the symptoms presented, or represented a disability picture the cause of which was not readily apparent or explained by medical science. There were a number of instances during the short period of conflict where US and coalition troops were exposed to questionable environmental agents suspicious of poison gas, intense smoke from burning oilfields, and even depleted uranium from expended tank ordnance. (Armor-piercing shells are tipped with radiation-depleted uranium for hardness that provides the armor-piercing abilities.) Because the disability picture presented in a number of these claims did not result in a diagnosis of a specific disability, those claims had to be denied since there were no provisions of the law in effect at that time that would permit the establishment of S/C for disabilities that had no diagnosis. To remedy this situation, Congress, through various pieces of legislation starting with the *Persian Gulf War Veterans' Act of 1994*, the *Persian Gulf War Veterans Act of 1998*, and the latest legislative act, the *Veterans Education and Benefits Expansion Act of 2001*, also known as Public Law 107-103, established and modified 38 CFR 3.317 to allow for the establishment of S/C for what is referred to as “undiagnosed illnesses”.

Although the law was clearly intended for the veterans of the “first” Gulf War, (referred to as *Operation Desert Shield* and *Operation Desert Storm*), the provisions of PL 107-103 extended the presumptive period to 9/30/11 (it was scheduled for expiration 12/31/06). Hence, veterans of the current Iraq conflict are included, so long as they meet the service requirements of 38 CFR 3.317. Claims from those veterans will receive consideration under that provision of the law regardless of whether or not the claim includes an “undiagnosed illness”.

Required Specific Service Dates

38 CFR 3.317 defines qualifying Gulf War service as beginning on 8/2/90 and continuing through 9/30/2011 (as amended by PL 107-103). Remember that, although this provision of the law was originally intended for only veterans of what is now referred to as the first Gulf War, amendatory legislation passed since the original law (11/2/94) has effectively included the current conflict in Iraq. However, in order to be considered under this law, the veteran not only has to have the requisite service during the established time frames, but also must be shown by official records to have performed this service in one (or more) of the specific duty locations described in the following topic.

Required Specific Duty Locations

38 CFR 3.317 defines a “Gulf War veteran” as one who served in the active military, naval, or air service in the Southeast Asia theatre of operations during the Gulf War (service periods as described in the previous topic). The specific duty locations are as follows:

- Iraq
- Kuwait

- Saudi Arabia
- The “neutral zone” between Iraq and Saudi Arabia
- United Arab Emirates
- Bahrain
- Qatar
- Oman
- The Gulf of Aden
- The Gulf of Oman
- The Persian Gulf
- The Arabian Sea
- The Red Sea
- The airspace above these locations

It is vital to understand that official records must place the veteran in one (or more) of these specific locations during the specified time frame as prescribed by law in order for the provisions of this law to apply to the claim; merely serving in the military during the established time frame at other duty locations does NOT establish eligibility. It is also significant that Afghanistan is specifically **NOT** included. The term “*the airspace above the specified locations*” as well as “*service performed on the 5 specified bodies of water*” are meant to be general in character, as opposed to the requirement to “have at least one foot on the ground” for consideration under the Agent Orange provisions for Vietnam-era veterans. As long as the claimant can be placed by official records in an aircraft flying over the specified duty locations, or on board a ship sailing in any of the 5 specified bodies of water, the provisions of this law will apply to the claim.

Specific Disabilities and General Symptoms Included

The law (38 CFR 3.317) defines a “qualifying chronic disability” as one resulting from any of the following (or any combination of the following):

- a. An undiagnosed illness;
- b. The following medically unexplained chronic multi-symptom illness that are defined by a cluster of signs or symptoms:
 - i. Chronic Fatigue Syndrome (CFS);
 - ii. Fibromyalgia;
 - iii. Irritable Bowel Syndrome (IBS);
 - iv. Amyotrophic Lateral Sclerosis (ALS).
- c. Any diagnosed illness that is determined by VA regulation to warrant a presumption of service connection. (This provision merely re-states the applicability of the elements of 38 CFR 3.309 as they pertain to presumptive disabilities considered under routine claims, and does not connote any special consideration or provision of the law concerning Gulf War veterans.)

The law further defines “medically unexplained chronic multi-symptom illness” as a diagnosed illness without conclusive pathophysiology or etiology that is characterized by overlapping symptoms and signs, and has features such as fatigue, pain, disability out of proportion to physical findings and inconsistent demonstration of laboratory abnormalities.

This law specifies a list of 13 categories of signs or symptoms that may be a manifestation of an undiagnosed illness or a chronic multi-symptom illness. They are:

- Abnormal weight loss;
- Cardiovascular signs or symptoms;
- Fatigue;
- Gastrointestinal signs or symptoms;
- Headache;
- Joint pain;
- Menstrual disorders;
- Muscle Pain;
- Neurologic signs or symptoms;
- Neuropsychological signs or symptoms;
- Signs or symptoms involving the skin;
- Signs or symptoms involving the respiratory system (upper or lower);
- Sleep disturbances.

The law states that this list of 13 signs or symptoms is not meant to be all-inclusive, as signs or symptoms not represented by the listed categories *can* also qualify for consideration. Remember though, that for a claim for service connection for any disability under the provisions of 38 CFR 3.317 to be successful, not only does the service have to have been performed during the specified dates, and at the specific locations stated in the law, but the specific qualifying provisions of the law must be met. These are the subjects of the next topic. All three conditions must be fulfilled in order for the special provisions of this law to apply to the claim.

It is important to realize that, because of the non-specific nature of the signs and symptoms of these “undiagnosed illnesses”, often private or VA medical evidence is either non-existent or of limited value. In these situations, most often lay evidence, such as statements from friends, family members, co-workers or employers can be of significant probative value. For example, a veteran is suffering from chronic muscle pain of the upper and lower extremities. He’s been to the doctor, who tells him that he can’t find any underlying cause. Is he going to go back to the doctor each time the pain reoccurs? Likely not. However, he will more than likely voice his complaints to family and co-workers. In this example, medical evidence

would not provide the chronicity required for consideration under 38 CFR 3.317; however, the lay statements from family and co-workers could.

Specific Qualifying Provisions of This Law

The provisions of 38 CFR 3.317 require that four specific requirements be met before service connection can be established for the undiagnosed illness:

- **Presumptive**: the claimed illness must have arisen during the presumptive period established by 38 CFR 3.317, defined as beginning on the day following the last performance of active service in the Southwest Asia theatre during the Gulf War and ending on 9/30/11;
- **Chronic**: the claimed illness must be chronic, further defined as having persisted for at least 6 months;
- **Compensable**: the claimed illness must be found to be at least 10% disabling;
- **Undiagnosed**: the disability resulting from the signs or symptoms must not be otherwise diagnosed as a recognized disease or disability (except for the 4 specific disabilities listed in the prior topic). *(Once the claimed disability has a diagnosis attached to it, the special provisions of 38 CFR 3.317 no longer apply, and service connection can only be considered under the direct, presumptive, or aggravated provisions of the laws applying to all other claims for service connection.)*

For review purposes, in order for a claim for undiagnosed illness to be successful, all of the following must be present:

- Service must be performed within the specified dates;
- Service must be performed in the locations specified;
- Illness should consist of a set of signs or symptoms specified in the law;
- Illness must be chronic, compensable, undiagnosed, and arose during the established presumptive period.

Reminder

Just like all other claims based on “exposure”, such as exposure to Agent Orange, exposure to radiation, etc., “exposure” in and of itself, is NOT a disability. Thus, there can be no recognized claims from a Gulf War veteran who merely claims “exposure” to any environmental or geologic agent or event without any underlying claim for disability or disease.

Gulf War Registry/Gulf War Exams

Learning a lesson from the Vietnam era veterans claims, when new disabilities were added to the list of presumptive disabilities based on Agent Orange exposure, but there was no established listing of Vietnam veterans to enable individual notification, VBA initiated a

“Gulf War Registry” for Gulf War veterans. All “Gulf War veterans” (meeting the criteria established by 38 CFR 3.317) are provided an opportunity to be placed on this registry. It is merely a compilation of names and medical records of veterans and some identifying data that is maintained by VA. In the event that additional disabilities are later found to be related to Gulf War service, those on the registry would be contacted directly, rather than having to depend upon the media to be informed of these new disabilities. You should encourage qualifying veterans to ask to be placed on this registry. There is no requirement that a specific claim for benefits be filed, or that the applicant be in receipt of VA benefits. All that is required is that the veteran meet the regulatory definition of a Gulf War veteran, and that he or she specifically ask VA to be placed on this registry.

VHA has established a special medical examination, available to all Gulf War veterans, known as a Gulf War Registry examination. This examination is available to all veterans who meet the regulatory definition of a “Gulf War veteran”, and is unrelated to any claim for compensation benefits. Like the registry itself, any Gulf War veteran may go to any VA medical facility and request this special examination. Should a subsequent claim for benefits be filed, then VA will request the examination results to be used in the development and processing of the claim. However, a specific claim for benefits does not have to be made in order to request this examination.

Role of the Service Officer

You, the Service Officer, can best serve your clients by remaining cognizant of the provisions of 38 CFR 3.317 as they apply to veterans of the Southwest Asia theatre of operations. Whenever you assist a veteran who served in theatre, you should explain the provisions of the law to the client, and the concept of “undiagnosed illness”.

You, the Service Officer, should remain cognizant of the significant probative value that lay statements can provide in claims for undiagnosed illness. Very often, they can be the key evidence in meeting the “chronicity” requirement of 38 CFR 3.317. You should actively encourage your client to solicit and provide these types of statements when preparing a claim for undiagnosed illness to VA.

You, the Service Officer, should always recommend to any client who served in the Southwest Asia theatre of operations that they participate in the Gulf War registry, and avail themselves of a Gulf War examination even if they do not desire to file a claim for service connection at the time of the interview. Both those actions provide a valuable service to the client.

You, the Service Officer, should keep in mind that, although the provisions of 38 CFR 3.317 were created to address complaints and concerns from those veterans of the first Gulf War (Operations Desert Shield and Desert Storm), the period of presumption established by that legislation is still open, and remains so until 9/30/11. Accordingly, veterans of the current Iraq conflict (but NOT Afghanistan!) are covered so long as they served in the theatre of operations, and any claims that are filed by them should be reviewed in light of those provisions.